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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. _____

JOSEPH L. BRIZARD,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

JOSEPH L. BRIZARD,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

Petitioner, Joseph L. Brizard, prays that a Writ of Certiorari issue to review judgment of the New Jersey Supreme Court entered in the above entitled case on November 12, 1973.

Citations to Opinions Below

The opinion of the trial court on petitioner's motion for a new trial is reported sub nom. *State* v. *Yormark*, 120 N. J. Super. 17, 293 A. 2d 547 (Law Div. 1972). The opinion of the Superior Court of New Jersey, Appellate Division and the denial of petitioner's Petition for Cer-

tification to the New Jersey Supreme Court are not reported.

Jurisdiction

The New Jersey Supreme Court's denial of the Petition for Certification was entered on November 12, 1973. (Appendix B hereto, infra P3a).

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

Questions Presented for Review

1. Was the petitioner denied due process of law in violation of Amendment Fourteen of the United States Constitution when the trial court assumed the existence of a conspiracy on petitioner's motion for a new trial.

2. Does Rule 1:16 of the New Jersey Court Rules, 1969, as applied deny petitioner Due Process of Law and Equal Protection of the laws in violation of Amendment Fourteen of the United States Constitution.

Statement of the Case

Petitioner was indicted with five others for conspiracy to obtain money under false pretenses and to unlawfully embezzle funds belonging to the Maryland Casualty Company. The charges against one defendant were dismissed and a second defendant was severed. On September 14, 1970, petitioner and Dr. Robert Mulvaney, Stanley Perwin and Milton Yormark were tried before the Honorable Ralph L. Fusco, J.S.C. and a jury. The trial lasted several months and on January 8, 1971, the jury found all the defendants guilty as charged.

During the summations, Mr. George C. Wilson, one of the sixteen jurors selected to hear the case, reported an incident to the Court involving the action of a person who identified himself as Dr. Brown. According to Mr. Wilson, Dr. Brown had approached his wife during the afternoon of January 5, 1971, at Martland Medical Center in Newark where she worked. Dr. Brown spoke favorably about Dr. Mulvaney, stating that he was very active in the Negro cause and was a very good man. Dr. Brown further stated that he had testified on Dr. Mulvaney's behalf (p. 14a).

Mr. Wilson notified the judge of this occurrence. Judge Fusco instructed Mr. Wilson not to discuss the matter with anyone (p. 12a). Subsequent to this instruction, Mr. Wilson received a telephone call from Dr. Brown on the evening of January 5, 1971. Mr. Wilson did not speak to Dr. Brown, however (p. 15a).

On the following day the juror reported this incident to Judge Fusco who then questioned him in the presence of counsel. Following this interrogation the judge was satisfied that the juror could still be fair and impartial. He again repeated his command that Mr. Wilson not discuss the incident with the other jurors (pp. 15a-16a). Mr. Wilson was eventually selected to deliberate and motions to excuse him were denied.

Approximately one year after the trial, Mr. Ronald Porambo a reporter employed by the Education Broadsasting Corporation interviewed nine of the jurors who sat at petitioner's trial. He recorded these conversations which showed that Mr. Wilson had related the embracery attempt to several other jurors during the course of their deliberations, in direct contravention to the judge's order.

On the basis of this newly discovered evidence, the defendant's moved for a new trial on March 17, 1972. Petitioner Brizard did not actively participate in the motion since a decision either way would be dispositive of his case. Testimony was taken on May 22, May 23 and May 26, 1972 and a decision was rendered on July 12, 1972 by the Honorable Edward F. Johnson, J.S.C. denying the motion for a new trial (App. C). Judge Johnson found that although the verdict was indeed tainted by Mr. Wilson's relation of the embracery attempt to his fellow jurors, a new trial would not be granted where the defendants or their agents helped to bring about the taint. The judge further found that the initial "conspiracy of which the defendant's were convicted did not terminate with their apprehension." He found that Porambo was an agent of defendant Yormark and that "while they [the other defendants] may not have been privy to the entering of said plot by Porambo they should not benefit by his nefarious acts." (P10a).

The Superior Court of New Jersey, Appellate Division affirmed Judge Johnson's decision in a per curiam opinion on June 19, 1973 (App. A). On appeal, petitioner had raised the issue of the unconstitutionality of the application of Rule 1:16. The Appellate Division found no merit to this argument. A petition for certification was then denied by the New Jersey Supreme Court on November 12, 1973 (App. B). Petitioner had again asserted that the assumption of a consipiracy violated the due process clause of the Fourteenth Amendment. This argument was likewise found unmeritorious.

REASONS FOR GRANTING THE WRIT

(a) The instant case presents a unique and foreboding broadening of the use of conspiracy in our system of criminal justice. On defendant's motion for a new trial, Judge Johnson was faced with an apparent Hobsons' choice. On the one hand the evidence indicated that a juror, in clear contravention of the Court's order, had divulged to his fellow jurors the fact that a third party had spoken to his wife in an attempt to influence the verdict. At least several of the jurors had been made aware of this fact during deliberation of the case. The Court stated that under these circumstances he was compelled to find that the verdict rendered had been tainted (P4a). On the other hand, however, was the fact that the testimony of the man who had unearthed the tainted verdict seemed to indicate that he did so at the direction of one of the defendants. Caught in between the polarization was the petitioner and the other two defendants whom the Court found to have played no active role in the discovery of this new evidence.

The decision rendered by the Court was one born of expediency and was based on the theory of implied conspiracy. Thus the Court found that:

> "It is apparent to me that the conspiracy of which these defendants were convicted did not terminate with their apprehension. The defendant Yormark has continued to work for the benefit of his co-conspirators and while they may not have been privy to the entering of said plot by Porambo, they should not benefit by his nefarious acts. The only effective method of preventing such conduct is to suppress the use of that which was learned improperly." (P10a).

It is respectfully submitted that this pragmatic exclusionary rule was established at the expense of petitioner's constitutional rights.

The Due Process Clause of the Fourteenth Amendment includes in its guarantees the reasonable doubt standard. "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U. S. 358, 364, 90 S. Ct. 1068, 1073 (1970). The theory of conspiracy and its widespread use in criminal prosecutions has been looked upon with disfavor by many eminent jurists because of the diminishing effect it has upon the State's burden of proof. See *Krulewitch* v. *United States,* 336 U. S. 440, 68 S. Ct. 116 (1948) (Jaskson concurring). That effect is multiplied a hundredfold when conspiracy is amplified to include an implied conspiracy. This is the evil sought to be eliminated in *Krulewitch, supra; Lutwak* v. *United States,* 344 U. S. 604, 72 S. Ct. 481 (1952) and *Gruenwald* v. *United States,* 353 U. S. 391, 77 S. Ct. 963 (1956). These cases laid to rest the theory that the law imputes to co-conspirators a continuing conspiracy to defeat justice. As stated by Mr. Justice Jackson in his concurring opinion:

> "On the theory that the law will impute to the confederates a continuing conspiracy to defeat justice, one conceivably could be bound by another's unauthorized and unknown commission of perjury, bribery of a juror or witness, or even putting an incorrigible witness with damaging information out of the way." 336 U. S. at 456, 69 S. Ct. at 724.

Such abuses are no longer tolerated in conspiracy prosecutions. A conspiracy is deemed terminated when its central objective is achieved. *United States* v. *Hickey,* 360 F. 2d 127 (7th Cir. 1966).

In the case sub judice this standard was ignored, however. The Court found that the initial conspiracy to obtain money under false pretenses continued, with the subsidiary objective of bribing a juror and bringing this to light at a later date if the bribe failed. The Court found no participation in the scheme by three of the defendants, nor did it find that they were even aware of the scheme. Nevertheless, it extended vicarious liability to the petitioner.

Had this issue arisen in a later criminal proceeding for embracery, there would have been little room for variance. On the basis of *Krulewitch*, supra, and *In re Winship*, supra, the Court would have been compelled to find proof of petitioner's guilt in the alleged conspiracy beyond a reasonable doubt. However at this posture of the case the Court was left with little guidance and thus relied on an implied conspiracy theory. Petitioner concedes that there is no case on point requiring proof beyond a reasonable doubt on a motion for a new trial. However, the rationale of *Winship* mandates this very conclusion. That case involved a juvenile proceeding and a reasonable doubt standard was applied. The basis for this application is the fact that there existed a proceeding in which a violation of a criminal law was charged and on which criminal sanctions might be imposed. Likewise, in the case sub judice, criminal sanctions hinged on the determination of the motion. Although petitioner had been found guilty, that verdict had been shown to be tainted. In a very real sense, a criminal sanction was dependent on the outcome of the motion for a new trial. It is respectfully submitted that in such a critical stage the reasonable doubt standard was mandated.

(b) Rule 1:16 of the New Jersey Court Rules, 1969, provides as follows:

> Except by leave of court granted upon good cause shown, no attorney or party shall himself or

> through any investigator or other person acting for him interview, examine or question any grand or petit juror with respect to the verdict or deliberations of the jury in any action.

This proscription, reflects the general rule against interviewing jurors first espoused in *Mattox* v. *United States*, 146 U. S. 140, 13 S. Ct. 50 (1892) and *McDonald* v. *Pless*, 238 U. S. 264, 35 S. Ct. 783 (1914). The rule is not without its exceptions, however, for where the interests of justice so dictate, compromises must be made.

Although it states the general rule, Rule 1:16 does not provide the sanction to be applied for non-compliance. This task is thrust upon the Court in each instance. The penalty chosen by the Court herein, i.e. exclusion of that which was learned improperly, might be the proper remedy in certain situations not presented in this case. Should the case arise wherein a single defendant were to violate Rule 1:16 an exclusionary remedy would be justified. However, where the case involves multiple defendants, it is respectfully submitted that total exclusion does violence to both the interests of justice and the codefendant's constitutional rights.

It is beyond question that the Sixth Amendment and the Fourteenth Amendment guarantee to the accused the right to a fair trial by an impartial jury. "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process". *Irvin* v. *Dowd*, 366 U. S. 717, 722, 81 S. Ct. 1636 (1961).

The deleterious effect of communications with a juror by a third party upon the jury's impartiality has long been recognized, whether that third party be linked to the prosecution; *Parker* v. *Gladden*, 385 U. S. 363, 87 S. Ct.

468 (1966) or to the defense, *Remmer* v. *United States,* 350 U. S. 377, 76 S. Ct. 425 (1956), *United States* v. *Miller,* 281 F. 2d 529 (2d Cir. 1967); cert. den. 392 U. S. 929 88 S. Ct. 2273, rehearing denied 393 U. S. 902, 89 S. Ct. 66. The effect of such a communication was readily recognized by Judge Johnson. He stated in his opinion,

> "No person should be convicted as the result of impropriety or prejudice. It cannot be said that for a juror to state to his fellow jurors that an attempt to influence him had been made, whether that be the truth or not, has no impact on that juror or the others to whom the information is imparted. In all jurisdictions where fairness and justice reign a verdict tainted by such information should be set aside." (P9a).

In light of this statement, it is clear that petitioner was prejudiced by the embracery attempt and the subsequent relay of this fact to the jury.

By applying an exclusionary sanction, the Court upheld the tainted verdict as punishment for a co-defendant's misconduct. The Court placed a greater priority on the need for deterrence than on petitioner's constitutional rights. It is respectfully submitted that such action was unwarranted in light of the existence of a third viable alternative. The Court could have made findings of fact regarding each co-defendant's participation in the alleged scheme in order to determine his respective culpability. The exclusionary sanction could then be applied fairly and in the interests of justice. Instead, the total exclusion mandated by the Court supported a tainted verdict and made a mockery of the right to trial by a fair and impartial jury. The Court's action insulated the verdict from any possible attack and for this reason it should be set aside.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

ANGELO R. BIANCHI,
Counsel for Petitioner.

BIANCHI AND COLASANTI,
Attorneys for Petitioner.

MICHAEL A. CASALE,
On the Petition.

APPENDIX A

***Per Curiam* Opinion of the Superior Court of New Jersey, Appellate Division**

(Filed—June 19, 1973)

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

J. L. BRIZARD,

Defendant-Appellant.

(A-3515-71)

Argued June 4, 1973—Decided June 19, 1973

Before Judges Collester, Leonard and Halpern.

On appeal from Superior Court, Law Division, Essex County.

Reported at 120 N. J. Super. 177 (Law Div. 1972).

Mr. Angelo R. Bianchi argued the cause for appellant.

Mr. R. Benjamin Cohen, Assistant Prosecutor, argued the cause for respondent (Mr. Joseph P. Lordi, Essex County Prosecutor, attorney; Mr. Peter N. Gilbreth, Legal Assistant, on the brief).

PER CURIAM

Appendix A

Following a four-month jury trial defendant (Brizard) and three others were convicted of conspiracy to obtain money under false pretenses. We affirmed. *State* v. *Yormark,* 117 N. J. Super. 315 (App. Div. 1971). Although Brizard was not a party to either proceeding, certification was denied, 60 N. J. 138 (1972), as was *certiorari,* 407 U.S. 925 (1972).

About 14 months subsequent to their convictions, Perwin and Mulvaney moved for a new trial, based upon newly discovered evidence. Testimony was taken and the motion denied. It is to be noted that the motion record discloses that defendant did not join therein and his counsel was "not present" at any time during the hearing and argument thereon. Nevertheless, defendant appeals from the order denying the motion, asserting that "[T]he opinion apparently included all defendants • • •."

In view of the above circumstances, defendant's right to maintain this appeal is debatable. See *State* v. *James,* 51 N.J. 10 (1967); *State* v. *Riley,* 49 N.J. Super. 570, 584 (App. Div. 1958), reversed in part and affirmed in part, 28 N.J. 188, 207 (1958), *cert.* den. 361 U.S. 879 (1959). In any event, we shall decide this appeal on its merits. So viewed, we affirm essentially for the reasons stated by the trial judge in his written opinion reported at 120 N.J. Super. 177 (Law Div. 1972).

Affirmed.

APPENDIX B

Order of the Supreme Court of New Jersey Denying Certification

SUPREME COURT OF NEW JERSEY
C-211 SEPTEMBER TERM 1973

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSEPH L. BRIZARD,

Defendant-Petitioner.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied.

WITNESS the Honorable Nathan L. Jacobs, Acting Chief Justice, at Trenton on the 12th day of November, 1973.

FLORENCE R. PESKOE
Clerk

Filed

Nov 12 1973
FLORENCE R. PESKOE
Clerk

APPENDIX C

Opinion of the Superior Court of New Jersey
(Filed—July 12, 1972)

SUPERIOR COURT OF NEW JERSEY
Law Division—Essex County
Indts. #1195-69 and 1196-69

STATE OF NEW JERSEY,

Plaintiff,

v.

MILTON YORMARK, STANLEY PERWIN,
ROBERT MULVANEY, J. L. BRIZARD,

Defendants.

Decided July 12, 1972

Mr. Alan Silber, Assistant Prosecutor, appeared for Mr. Joseph P. Lordi, Essex County Prosecutor, attorney

Mr. Richard A. Walsh, attorney, appeared for defendant Stanley Perwin

Mr. Stephen N. Dermer, attorney, appeared for defendant Robert Mulvaney

JOHNSON, J.S.C.

Appendix C

The four defendants named above were charged with conspiracy to obtain money under false pretenses and the defendants Yormark and Perwin in addition were charged with obtaining money by false pretenses. After a protracted trial the defendants, on January 8, 1971, were found gulity of the various charges by a jury and thereafter each of the defendants was sentenced to a custodial term in the County Penitentiary and fined.

Following the entry of judgment the defendants appealed to the Appellate Division of the Superior Court which affirmed the various convictions.

Three of said defendants filed a petition for certification to the New Jersey Supreme Court which denied the same.

On February 2, 1972 the defendants applied for a stay of sentence to permit them to apply to the Supreme Court of the United States. This stay was granted until March 20, 1972. On March 6, 1972 an application for a stay of sentence was made to said Court which application was denied on March 15, 1972.

On March 17, 1972 a motion was made to this Court for a new trial on the ground of newly discovered evidence alleging that the verdict of the jury had been improperly influenced as set forth in an affidavit attached to the notice of motion.

Thereafter this Court took testimony on many days and heard the arguments of counsel. Counsel have also submitted briefs which have been considered.

The defendants herein have presented evidence from which this Court concludes that after all parties had announced to the Court they rested and during the summa-

tion an overnight recess was taken. The next morning one of the jurors conferred with the trial judge and advised him that an attempt had been made to have the wife of said juror intercede with said juror on behalf of one of the defendants. Thereafter said juror was interrogated in open court, outside the presence of the other jurors. The juror stated he would not be prejudiced thereby. The defendants moved to dismiss the juror. The trial judge denied said motions and permitted the juror to remain as a member of said jury but admonished him not to disclose the alleged incident to the remaining jury members. After the completion of the summations and charge of the court a jury of 12 was selected pursuant to R. 1:8-2(c) and the juror in question was chosen as one of the 12 to decide the issues in said case.

On this motion the defendants contend that during the deliberations of said jury the juror in direct violation of the court's admonition disclosed to some or all of the other jurors that an attempt had been made to influence him. They argue that this misconduct on the part of the juror is capable of tainting the verdict and that said verdict should be set aside. In support of this contention the defendants cite as authority several decisions of this State as well as the federal courts and the Supreme Court of the United States. Among these decisions are *State* v. *Kociolek* 20 N.J. 92 (1955); *State* v. *Levitt* 36 N.J. 266 (1961); *State* v. *La Fera* 42 N.J. 97 (1964); *Remmer* v. *U. S.* 347 U.S. 227, 74 S. Ct. 450, 98 L.Ed. 654 (1954); *Stone* v. *U. S.* 113 F 2d 70 (6 Cir. 1970), *U. S.* v. *Rakes* 74 F. Supp. 645 (E.D. Va. 1947).

The State, in opposing said motion, does not deny that the alleged misconduct of the juror might have improperly influenced his fellow jurors but argues that the alleged

misconduct of the juror was not only improperly instigated by the alleged misconduct of the defendants but was thereafter "discovered" by the continued allegedly improper conduct of the defendants. The State argues that the defendants violated a rule promulgated by the Supreme Court of New Jersey and for that reason no evidence of taint, if it existed, should be permitted to be used by such a defendant to attain that which he would have attained if his first alleged act of misconduct had been successful.

R. 1:16 of the *Rules of General Application* entitled *Miscellaneous Limitations on Attorneys and Parties* reads in section 1:

> Except by leave of court granted upon good cause shown, no attorney or party shall himself or through any investigator or other person acting for him interview, examine or question any grand or petit juror with respect to the verdict or deliberations of the jury in any action.

Following the filing of the motion for a new trial by the defendants the State filed a motion for permission to examine the jurors. At that time this Court noted there was a strong public policy against probing into jury verdicts. Jurors to are to be protected against efforts to browse among their thoughts in search of something to invalidate their verdicts and this Court stated it would not permit interrogation of any jurors until it could decide how and where the interrogation that apparently had take place had its genesis.

The Court now has had the benefit of the tapes used to record portions of the interviews held with the jurors,

transcripts of those tapes prepared at the order of the Court by a certified court reporter, and oral testimony taken in open court in the presence of all counsel. The Court has had the benefit of observing the demeanor of the various witnesses and is satisfied therefrom that the witness Ronald Porambo was requested by the defendant Milton Yormark to hold said interviews in a planned effort to obtain sufficient information to attempt to set aside the verdict returned by those jurors.

Although the witness Porambo testified that he was simply working on a journalistic assignment and during his interviewing of jurors in question he uncovered the information which forms the basis of the motion for a new trial I do not believe his testimony.

Evidence, to be believed, must not only proceed from the mouth of a credible witness, but it must be credible in itself—such as the common experience and observation of mankind can approve as probable under the circumstances. We have no test of the truth of human testimony, except its conformity to our knowledge, observation and experience. Whatever is repugnant to these belongs to the miraculous, and is beyond judicial cognizance. Evidence is generally considered improbable when it imputes to the parties to a transaction, occurring in the ordinary course of business, conduct inconsistent with the principles by which men, similarly situated, are usually governed. *Daggers* v. *Van Dyck*, 37 N. J. Eq. 130 (Ch. 1883).

The manner in which the witness Porambo testified, his inappropriate laughter during his examination, his hedging when asked direct questions on specific points and his failure to articulate his reasons for the various interviews belies his true purpose. If he were on a journal-

istic mission as he testified, why did he not complete it rather than turn over the tapes to a defendant with whom he had no connection, as he contended?

There was also produced the testimony of several members of the bar who testified they had nothing to do with the actions of Porambo and were unaware of what he was doing until after he had done it. I am satisfied these attorneys did not intitiate the interviews but I am not satisfied they told "the whole truth and nothing but the truth." These attorneys are men of vast experience. They knew that what Porambo was up to was something they could not be associated with and so they simply closed their eyes in the hope it would go away.

While the State argues that the evidence shows the fine hand of an attorney directing the actions of Porambo and asks the Court to infer that those directions were given by the various attorneys who represented the defendants, I do not so find. The legal directions followed by Porambo were supplied by the defendant Milton Yormark who it must be noted has disappeared and has failed to surrender himself to the Sheriff as required.

The principal question raised on this motion is an interesting and novel one—one which requires a balancing of equities. No person should be convicted as the result of impropriety or prejudice. It cannot be said that for a juror to state to his fellow jurors that an attempt to influence him had been made, whether that be the truth or not, has no impact on that juror or the others to whom the information is imparted. In all jurisdictions where fairness and justice reign a verdict tainted by such information should be set aside.

Appendix C

On the other hand the people are also entitled to justice. To permit an accused or someone acting on his behalf to attempt to influence jurors would thwart all justice and prevent all convictions. Should such actions go unstopped; To permit an accused to view members of a jury over a long trial (as here for five months) and see if he thinks one might be approachable and then to contact that juror, would scrap the entire administration of justice.

To compound the problem it would be unthinkable that such an accused be permitted to set aside his conviction by bringing to the attention of the Court his wrongdoing in attempting to influence a juror. Justice must require greater protection for society than that. The *Supreme Court* stated in *State* v. *La Fera, supra,* "when contending values clash in their demands, a balance must be struck, and the balance struck is not a poor one because in some unknowable cases there may be an injustice." 42 N. J. at 107.

To permit these defendants to benefit by their own wrongdoing simply shocks my sense of fairness and justice. I for one cannot be a party to that disregard for the rights of so many. It is apparent to me that the conspiracy of which these defendants were convicted did not terminate with their apprehension. The defendant Yormark has continued to work for the benefit of his co-conspirators and while they may not have been privy to the entering of said plot by Porambo they should not benefit by his nefarious acts. The only effective method of preventing such conduct is to suppress the use of that which was learned improperly.

Appendix C

The motions made by the respective defendants for a new trial are denied as are the motions for bail. The motion by the State for permission to interview the jurors is likewise denied. Orders consented to as to form by all counsel should be submitted.

APPENDIX D

Excerpt from Voir Dire of George Wilson

(10,255)* Today, gentlemen, is Wednesday, January the 6th. Last night, Tuesday, January the 5th, at 6:05 p.m., I received a telephone call. The call I received—and I'm making this identification. Not the caller. I'll tell you what the caller said in a moment—was from Mr. George Wilson who occupies Jury Seat No. 5. His jury number is 559.

The caller identified himself as George Wilson. He said, "I went to pick up my wife at (10,256) Martland Medical Center where she works. Dr. Brown, who testified for Dr. Mulvaney, approached my wife and asked her if I had discussed the case with her. Said to her the case is about to be sent to the jury and asked her if she could influence me for Dr. Mulvaney."

I made some notes of this telephone call at the time that I received them. I'm going to mark it C-278 and have them filed with the proceedings. Mr. Roche, please.

(Notes marked exhibit C-278.)

The Court: I instructed Mr. Wilson not to discuss the matter with anyone and that the matter would be taken up with him further today.

At 9:25 this morning I communicated with the Prosecutor's office to send a representative to this court since a matter which is going to require investigation by the law enforcement authorities of this State has transpired

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* Numbers in parentheses, unless otherwise indicated, refer to pages in the transcript of the testimony.

and the Prosecutor's office is to undertake such investigation.

In the meanwhile, I'm going to call Mr. Wilson in, have him relate for the record what transpired and inquire of him whether the fact of the approach to his wife and the conference that he had with his wife will affect his ability (10,257) to continue on this jury and render a fair verdict and make a determination thereafter, and after having given counsel an opportunity to be heard what action should be taken.

Now, while I've got this session in camera, I'd like to also review the problems that we left open at an earlier date, that is whether there should be a further voir dire of the jurors by the Court on any newspaper stories which they may have read about this or other cases which might influence their ability to render a fair verdict in this case. And the reason I asked for the position of counsel on this issue is because a great deal of time has transpired. But, if I recall correctly, that following the opinion of the *Zwillman* case counsel made a motion that a voir dire be undertaken. The Court suggested that it might be done at the conclusion of the entire case so that we don't have to keep taking the jurors individually into the courtroom to inquire of them if they have read or heard anything that would affect their ability to render a fair decision.

Now, let me inquire first of Mr. Wilson. After I have concluded with Mr. Wilson with the knowledge of what I have then I will hear from (10,258) counsel as to whether any further voir dire should be taken.

Will you ask Mr. Wilson to come in, please? Thank you.

Appendix D

(Mr. Wilson enters the courtroom.)

The Court: Mr. Wilson, good morning.

Mr. Wilson: Good morning, sir.

The Court: You may be seated, Mr. Wilson.

Mr. Wilson: Thank you.

The Court: Mr. Wilson—and by the way, your name is George C. Wilson, sir?

Mr. Wilson: Yes, sir.

The Court: And you are seated in jury position No. 5 during the course of this trial?

Mr. Wilson: I guess so.

The Court: That is the number.

Mr. Wilson: Yes, sir.

The Court: All right. Mr. Wilson, you called my home last night about 6 o'clock and you related something to me. I wonder if you will, to the best of your recollection, tell us what it is that you related to me.

Mr. Wilson: At my wife's place of employment, the Martland Medical Center, approximately 4 o'clock yesterday she was approached by a man who purported (10,259) to be a Dr. Brown. Dr. Brown said that he knew I was on the—this jury and that the case was going to be turned over to the jury on this day and that he was very concerned about Dr. Mulvaney; that he had testified on his behalf and he was worried about the outcome on his behalf, and he asked my wife if she had spoken to me about the case. My wife told him that she hadn't, and he continued to say that Dr. Mulvaney was very active in the Negro cause and a very good man, a very poor man, and he was wondering if my wife would speak to me on behalf of Dr. Mulvaney, and he would call back sometime during the evening, about 7:30 when, after I called you, sir, I went home and I took the telephone

off the hook. About 9 o'clock we put the phone back on the hook, and about five minutes after nine the phone rang. I asked my son who is ten years old to answer the phone and he identified the caller as a Dr. Brown.

I ordered him, told him not to let him know that we were home. About ten o'clock that evening the phone rang again. We didn't answer it. We assumed that it was the same person.

The Court: All right. Mr. Wilson, when you say she was approached by a man purporting to be (10,260) Dr. Brown this is what your wife told you?

Mr. Wilson: Yes.

The Court: And everything that you are relating to me is what your wife told you?

Mr. Wilson: That's what my wife said.

The Court: Now, Mr. Wilson, as a result of this experience that you have been exposed to do you feel that you can continue to serve as a juror in this case, hear the balance of the closing arguments of the State, my instructions as to the law to you, and if you are selected to deliberate, to deliberate fairly and squarely and base your decision on the evidence and nothing that's transpired since?

Mr. Wilson: Well, to be perfectly honest, I feel that I can as I don't know who this man was. I can't say—I have no feelings other than what he said. The impression that my wife gave me from what he said was that he may have acted on his own, or he emphasized so much about civil rights and things of that nature: but it hasn't affected—I have no feeling one way or the other. I haven't made my mind up with regard to this case at all.

The Court: And I'd like to put the query to you more directly: Do you feel that if you are (10,261) selected to

serve that you could render a fair and honest verdict as it affects not only the other three defendants but specifically Dr. Mulvaney even though this call was made without having this call influence—rather even though this conversation was had by you and your wife without having that conversation influence your decision?

Mr. Wilson: I feel that I can do that.

The Court: Thank you, Mr. Wilson. You may return to the jury room and please don't discuss this with anyone else.

Mr. Wilson: Of course.

(Mr. Wilson retires from the courtroom.)

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